NOTES ON THE NOTION OF INDIRECT RESPONSABILITY IN TORT

INTRODUCTION

Before starting off on a close analysis of the provisions in our Civil Code regarding Indirect Responsilbility in Tort and Quasi Tort, a short introduction to the concept of Tort in general would not be inopportune.

All persons, excluding Minors and the Insane, are responsible for their actions and are thus liable for the damage that ensues from their actions whether their actions caused the damage or contributed thereto. However, certain groups of individuals are not only responsible for the damage they directly produce by their own actions but are also responsible for the damage which other groups of persons produce by their acts - hence the Indirect Responsibility. Our code has been influenced by Post Classical Tendencies in as much as our has always been reluctant to accept the notion of liability without fault. This is in line with Justinian's ideology since in those days liability without fault was not considered to be compatible with the notions of Fairness and Justice.

Thus one may rightly ask, ''Since our provisions regarding Civil reponsibility are so very much based on the notion of **''FAULT''** why is it that certain groups of persons are held liable for damage produced by others?'' The correct answer to this question is that although at a first glance, such liability seems to be and absolute and objective liability independent from and irrespective of fault, on closer examination of the relevant provisions one finds that persons are answerable for the acts of others because these same persons, have been negligent in one way or another as far as the individuals for whom they have to answer are concerned. Thus the liability incurred by parents for the acts of their minor children arises because they do not exercise the care of a ''Bonus Paterfamilias''. Liability is also incurred by the employer because he is not careful enough to employe competent persons whom he has reason to consider competent.

Thus one can, generally speaking, say that even Indirect Responsibility as contemplated by our Law is based on the element of fault, and very few are those sections where objective and arbitrary liability is attached to a person irrespective of fault.

1. Section 1077: **LAIBILITY OF PERSON HAVING CHARGE OF A MINOR OR PERSON OF UNSOUND MIND.**

This section runs as follows:-

> ''Any person having the charge of a minor or of a person of unsound mind shall be liable for any damage caused by such minor or person of unsound mind, if he fails to exercise the care of a Bonus Paterfamilias in order to prevent the act.''

This is a perfect example of what has been stated above in that we are, in reality, not dealing with an absolute liability; for liability to be incurred it must be proved that the person responsible failed to exercise the care of a Bonus Paterfamilias. The problem that arises here is this:- *Who* is to prove that the person responsible he did not exericise the care of a bonus pater? Is it the person responsible who has to prove that he did exercise the appropriate care or is it the claimant who is to prove otherwise?

Due to the fact that the notion of **CARE** is really a subjective notion it would be reasonable and quite tolerable in such a situation for the parent or guardian to come out with a good explanation in order to exonerate himself from liability. On the other hand however, by the way the law is worded it seems that it is the plaintiff who must prove that the parent or guardian etc. failed to exercise the care of a Bonus pater.

In Criminal matters, the defendant is innocent until proven guilty. However is this the correct attitude to take as far as civil damages are concerned? Whilst in Criminal Law, which is of a punitive nature, it is only right that a person should be punished only if found responsilble beyond reasonable doubt and that human nature sometime begs for the person to be given the benefit of the doubt, in matters of Civil Damages it is no longer a case of Punitive Justice, it is no longer a case where the person responsible must be punished in order to make him see sense. In cases of Civil Damages, the person responsible is not the only one involved; it is the claimant who has been injured in one way or another and it is up to the person responsible to make up for the loss the plaintiff has incurred, due to his fault.

It has, in fact, been said that it would be fairer if it were up to the person on whose shoulders the duty of exercising care lies, to prove that he took all necessary measures of precaution and care expected of a Bonus Paterfamilias, rather than for the claimant to prove that such person did not take care of the minor or person of unsound mind as he should have.

In France *La responsabilité du fait des mineurs* as it is termed, is divided into three headings. It would be appropriate to elaborate on the first two.

1. La responsabilité des père et mère du fait de leurs enfants mineurs.

According to Carbonnier, in order that parents be responsible for the damage caused by their children three conditions are necessary:-

a. Parental authority:-
   Under this heading Carbonnier says that he who creates the damage must be under 18 years of age, and that those who are to be held responsible must be his/her mother or father.

b. Common abode:-
   Parents are no longer responsible if the child no longer lives with them.

c. It must be a damage made by the minor.
   With regard to the proof of fault, the French position is much more reasonable than that obtaining in Malta in terms of Section 1077 of our Civil Code. The plaintiff in France need not prove that the parents were at fault as the position seems to be in Malta from the wording of Sec. 1077. There exists a "juris tantum" presumption of responsibility, which the parents may rebut by proving that they did exercise the care of a Bonus Paterfamilias.

2. La responsabilité des Artisans.

Again according to Carbonnier, whilst the apprentice is personally responsible for the damage he commits it is the master who being in a better financial position, and who after all is supposed to be at the side of the apprentice, who pays for the damage. The part of the law really goes back a long time to the days when the apprentice used to live and eat at the master's home.

Three conditions are however necessary for this kind of liability:-

a. A Relationship of Teacher and Apprentice.
b. A degree of relationship between the damage caused and the Apprenticeship.
c. A damage caused by the Apprentice.

3. La responsabilité des accodemts scolaires.

Primarily there is apparently a distinction to be made between Private tuition and State tuition. The first is governed by Common Law notions of responsibility whilst the second is governed by special Bye-Laws.

2. Sections 1078 and 1079.

When tackled together with Section 1077, sections 1078 and 1079, may produce various different kinds of responsibility or even none at all.

Section 1078 runs as follows:-

> "Persons of unsound mind, children under nine years of age, and, unless it is proved that they have acted with a mischievous discretion, children who have not attained the age of 14, shall not be bound to make good the damage caused by them; saving, where competent, any action of the party injured against such persons as may be liable for such damage, under the provisions of the last preceding section."

From this section therefore one can see that there is an exception to the rule stated in Section 1074 saying "Every person however shall be liable for the damage which occurs through his fault."

Whilst Section 1074 is a general rule which is applied strictly, Section 1078 clearly excludes Minors under 9, and Insane persons and Minors under 14 who have acted without mischievous intent. With the result that an injured party may not have redress against such persons in case he suffers damages. I say *may* because there seems to be a saving clause later on in Section 1079, which I will discuss later.

However, before passing on to Section 1079, one sees that a problem may arise with regard to Section 1078. In that, if a person between the age of 9 and 14, WITH mischievous intent causes damage to and individual and there seems to be no person who can be held responsible under section 1077, what is the position?

The minor will have to pay up. However, what is the position if the minor has no funds? Under these circumstances, it seems that the plaintiff has no way out at all. And therefore whilst Section 1078 makes persons between the age of 9 and 14, who have acted with mischievous intent liable, in actual fact if there is no one responsible under Section 1077 and they also happen to have no means, the plaintiff may very well remain unpaid notwithstanding the fact that the children in question are technically liable.

The only possible way out is for the plaintiff to wait till the minor is in funds, possibly when he reaches majority. In the meantime the plaintiff must be careful not to let prescriptive time to elapse since it will extinguish the right of action. The prescriptive time for actions differ according to whether the action for damages arises from a non-criminal offence or from a criminal offence.

Section 2258 states:-

> "Actions for damages not arising from a criminal offence are barred by the lapse of two years.

Section 2259 states:-

> "(1) With regard to the prescription of civil actions for damages arising from criminal offences, the rules laid down in the Criminal Code (Chapter 12) relating to the prescription of Criminal actions shall be observed.
>
> (2) Nevertheless, any person who has stolen a thing, or who has become the possessor thereof by means of an offence of fraud, or who has received or bought such thing, knowing it to have been stolen or fraudulently

acquired, cannot prescribe for it, notwithstanding any lapse of time.''

Section 1079 is an interesting section because whilst Section 1078 exonerates the classes of persons it mentions, Section 1079 gives a plaintiff the chance of obtaining damages from persons who are, strictly speaking according to Section 1078, not liable.

Section 1079 says:-

> ''Nevertheless, where the party injured cannot recover damages from such other persons because they are not liable or because they have no means, and the said party has not by his own negligence, want of attention or imprudence given occasion to the damage, the Court may, having regard to the circumstances of the case, and particularly to the means of the party causing the damage and of the injured party, order the damage to be made good, wholly or in part, out of the property of the minor or of the person of unsound mind referred to in the last preceeding section.''

This section gives rise to a series of considerations.

1. Who do the words ''other persons'' refer to? Do they refer to those persons who under Section 1077 would be held liable for the actions of the minor? Or do they refer to the person - that is the minor or the insane person - who created the damage? One would be inclined to believe that the words ''other persons'' refer to the persons responsible under Section 1077, since it would not make sense otherwise.

2. There is no problem as far as the words ''... or because they have not means, ...'' are concerned, because it is only natural that if the minor who has created the damage, is in a finacial position to pay for such damage, and his parents who are according to law liable under Section 1077 to make good the damage, are not in a financial position to pay the damage then it is only fair that the Court should order that the plaintiff be paid out of the funds of the minor.

3. The peculiarity which arises is with regard to the purport of the words ''... because they are not liable ...'' At first glance one would think that there is nothing peculiar about these words or even their consequent meaning. However there is a rather odd state of affairs arising from these words when one bears in mind the previous sections.

Is the Law here imposing a liability on children who did not act with mischievous intent and whose parents, guardians, tutors, etc., are not liable for them under Section 1077?

The probable answer to this is that, generally speaking, a child under 9 and children under 14 who act without mischievous intent are not liable. However when serious damage ensues as a result of their actions, because this is why the law says ''Having regard to the circumstances of the case,...'' and their parents are not liable under section 1077, whilst at the same time the children are in a financial position to pay for such damage, then the court is empowered ''to order the damage to be made good wholly or in part out of the property of the minor or of the person of unsound mind...''.

The above argument seems to make even more sense when one applies it to the case where the guardian of an insane person is not liable under Secton 1077 and yet great damage has been caused by the insane person.

3. Section 1080:- **EMPLOYMENT OF INCOMPETENT PERSON.**

This section runs as follows:-

> "Where a person for any work or service whatsoever employs another person who is incompetent, or whom he has not reasonable grounds to consider competent, he shall be liable for any damage which such other person may, through incompetence in the performance of such work or service, cause to others."

The responsibility and liability of the employer in this section is one based on *Culpa in Eligendo*. It is not a general kind of liability where the employer is liable for all the damage done by the employee. An employer under Section 1080 will only be responsible for damage caused by his employee provided that the employer employs a person who is incompetent or whom he has not reasonable grounds to consider competent.

If one where to look at Section 1080 without looking at the words "... or whom he has not ... consider competent", one would imagine that an employer would find no difficulty in disclaiming liability because, he could easily say that he thought that the person he employed for the job was competent, and that he had no reasonable grounds to consider him incompetent.

However, probably for this very reason, the legislator thought it wise to include the words "or whom he has not reasonable grounds to consider competent." And there is a great difference, as one will appreciate, between the words, "he has no reasonable grounds to consider him incompetent," and "he has not reasonable grounds to consider him competent."

Whilst in the first hypothesis there is no obligation on the part of the employer to seek factual evidence of the individual's competence, in the second hypothesis, there is most definitely the obligation on the employer to seek such evidence and proof of the competence of the employee.

It is thus this phrase in Section 1080, which ensures to a more certain extent the answerability of the employer in those cases where the employer's liability is required.

This section of the law gives rise to an action in tort and not one in contract. One must carefully keep this difference between the two actions in mind for several reasons.

One of the main reasons is that an action in tort has a prescriptive period of 2 years whilst one in contract has a prescriptive period of 5 years.

However, the most important distinction between the two is that whilst Section 1080 establishes the responsibility of an employer who fails to employ competent people when the latter cause damage, **irrespective** of the existence or non-existence of any previous binding contract between the plaintiff and the defendant, an action based on contract necessitates the existence of a contract between the plaintiff and the defendant.

Thus:-

1. If A who is the employer in a building firm sends B, an employee, to build a room in Mrs. "X's" back garden and instead of a room B builds a pond, Mrs. "X" must sue A on the basis of the contract between Mrs. "X" and A.
2. If A who is the employer in a building firm sends a group of builders to build a 2nd floor in Mrs. "Y's" house and in so doing cause damage to the house next door belonging to Mrs. "Z", Z may sue A in Tort. There in no previous contract between A and Z, and thus Z cannot sue A on the basis of Contract.

   We see therefore the importance of choosing whether to make an action in tort or in contract.

Before finishing off on this part of the subject it would be interesting to have a look at the position in Italy. The general trend there, is that persons are responsible for damage done by 3rd parties in their employment. Torrente on page 673 says:-

> "Si ritiene che tale estremo sussista anche se il compartamento del dependente non sia stato tenuto proprio durante lo svolgimento della attività lavorativa, essendo sufficiente che il fatto dannoso sia stato provocato in occasione dell'esercizio delle incombenze affidate al lavoratore. Quindi, la responsabilità del datore di lavoro, sussiste anche nell'ipotesi di danno arrecato dal prestatore d'opera durante una pausa del lavoro o mentre stava deviando dalla mansione cui era stato preposto."

We see therefore how in Italy an employer is responsible for the actions of his employee and that there is no necessity of proving the existence or otherwise of 'culpa in eligendo'.

In fact Torrente goes on to say that this kind of general kind of responsibility is a derivative of the notion of Culpa in Eligendo which was once the rule in Italy as it was in France.

In Malta we still adhere to the concept of Culpa in Eligendo as above expained whilst most countries have opted for a wider kind of liability.

The increase in liability has encouraged many employers abroad to insure themselves. That is, the company or firm insures itself against damage caused by members of their staff. This kind of insurance is not only very popular in countries which have this kind of general liability, but is also on the increase in Malta.

4. Section 1082:- LIABILITY OF HOTEL KEEPERS

The next section dealing with indirect responsibility is that relating to hotelkeepers. The section in the code dealing with the above is a direct result of the 1962 International Convention sponsored by the Council of Europe entitled "Convention on the Liability of hotel keepers concerning the property of their guests," to which Malta became a signatory.

So far, in tackling the sections dealing with indirect responsibility a noticable point as stated in the introduction is that our Law of Tort is essentially based on the notion of fault and that even in the cases discussed of Indirect Responsibility all cases of liability alleged and amount of negligence of one kind or another with regard to the persons made liable.

However in Section 1082, one comes across a particular sub-section, 1082 ss (1) which makes the hotel keeper absolutely liable notwithstanding the fact that he did not cause the damage intentionally or negligently. It is true that there are other sub-sections which put forward various conditions which if found to be in existence may exonerate the hotelier from having to pay damages, however these supervening causes are quite seperate and independant of the fact that the sub-section above referred to instils liability independant of the element of fault.

The sub-section imposing this kind of liability runs as follows:-

Sec. 1082 ss.(1):-

> ''A hotel-keeper shall be liable up to an amount not exceeding seventy five pounds for any damage to or destruction or loss of property brought to the hotel by any guest.''

One may rightly ask, why should the hotel-keeper be liable up to seventy five pounds irrespective of fault or negligence? The reason is that very often, it becomes impossible for a plaintiff to produce evidence of fault against the hotel-keeper, and therefore to keep the guest happy in situations which often arise due to mislaid articles in hotel rooms, the international Convention introduces an objective responsibility independant of evidence of fault.

A slight division of opinion exists as to the requirements or otherwise of evidence that the thing was brought into the hotel. Some critics are of the opinion that the law establishes an objective kind of responsibility and therefore no evidence is necessary. On the other hand others criticise the above approach and think that due to the very wording of the law it is necessary for the guest to prove that the lost article was brought into the hotel, otherwise many guests can very well take advantage of such a provision. Whilst there is obviously a lot of sense in this argument, it is quite clearly impossible for the guest to show the hotel-keeper all his belongings prior to checking into the hotel. Other than for this practical reason, when one looks at the aim of this kind of legislation, which is to avoid unnecessary conflict between hotelier and guest one may find oneself favouring the objective and absolute responsibility approach rather than the latter.

Our Law has opted for the minimum stipulated in the convention as far as the amount for which the hotelier is responsible is concerned, - that of seventy five pounds. Normally on the continent instead of fixing a set amount, other countries have taken the line, of imposing an amount equivalent to the daily hotel rate multiplied by a hundred. Therefore if one is paying £40, per day, the hotel is normally liable up to £4,000.

The word ''Guest'' means that which is stated in sub section 7 of Section

1082, ''A person who stays at the hotel and has sleeping accommodation put at his disposal therin; but is not an employee in the hotel.''

This is important because it clearly establishes the fact that a hotelier is not responsible for any loss of any item belonging to persons who come to spend a day at the hotel.

Hotel-keeper according to subsection 8, ''Shall be construed as including reference to the person in charge of the hotel or of the reception of guests in the hotel.''

The word which has attracted much discussion is the word ''Hotel''. What is to be understood by the word hotel, or rather what constitutes a hotel for the purposes of Tort? Again there is a division of opinion. Some say that ''brought into the hotel'' means brought into the building which constitutes the hotel and therefore excluding parking areas, gardens, pools and beach areas; on the other hand others say that one simply cannot exclude outdoor sporting areas including the swimming pool area, tennis courts, as well as the parking area; A question one can validly put here is, is it fair that hoteliers should be held responsible for thefts from cars parked in the Hotel Parking area?

When one refers to the international convention, one sees that there is no such liability, for parking areas and therefore each signatory State has itself set its own rules regarding the matter.

Some critics say that the hotel parking area is not public property, and that normally it is considered as property belonging to the hotel, as a result of which any property such as vehicles, damaged or stolen in the parking area is the responsibility of the hotelier. If this is the case and if this is the correct interpretation and if a car in a hotel car park, is considered to have been brought into the hotel, then all those signs one often sees in hotel carparks, which say that leaving property there is at the owners own risk would in terms of Section 1082 sub section 6 para. 1,(which will be discussed later) be invalid.

On the other hand there is no such definitive rule in Malta which states that a hotel parking area is considered as within the meaning of hotel in Section 1082s.s.1. The law is silent as far as this matter is concerned and it would be interesting to refer to the Parliamentary debates refering to this Law. It so results that the relevant Minister on the 22nd December 1965, said that whosoever leaves his property in a car parked in hotel grounds and this is stolen, will be solely responsible. The position is not, as you would appreciate, at all clear.

Section 1082 subsection 2, is an interesting subsection establishing cases of unlimited liability:

> ''The liability of a hotel-keeper shall be unlimited:-
>
> (a)if the property has been deposited with him; or,
>
> (b)if he has refused to receive the deposit of property which he is bound under the provisions of the next subsection to receive for safe custody; or,
>
> (c)in any case in which the damage to, or destruction, or loss of, property has been caused, voluntarily, or through negligence or lack of skill, even in a slight degree by him or by a person in his employment or by any person for whose actions he is responsible.

The first thing that one should notice on reading Section 1082 ss 2, is that whilst in the 1st section an absolute and objective but limited liability is created viz-a-viz, the hotelier irrespective of fault or negligence, in subsection 2 one finds an element of indirect fault or negligence so characteristic in most of the sections dealing with indirect responsibility. A hotelier is unlimitedly responsible:-

(a) if the property has been deposited with him.

In this subsection, indeed this phrase in the subsection, establishes the hotelier's liability over things deposited with him, one asks what kind of care must the hotelier take of the things deposited with him. Must he take care of the thing as he would have taken care of his own things or must he take care of the things as a standard hotelier would do? The latter is obviously the correct answer. An answer aspect of the matter is with regard to safety deposit boxes.

Are such safety deposit boxes, normally located in a particular part of the hotel, to which the guest has access, to be considered as in the possession of the hotelier? Thus, if a thief steals some jewellery from Mr. Y's deposit box, is the hotelier to be held unlimitedly liable because such jewellery within the boxes is deemed to be deposited with the hotelier?

The situation is not at all clear, however there is a tendency to sort out the matter as follows:

1. If the object had actually been deposited with the hotelier himself, who in turn deposited it in the hotel safe, in this case the hotelier is unlimitedly liable, as the thing is deemed to have been deposited with him.
2. If the thing is deposited by the guest in a safety deposit box, given by the hotelier to the guest situated together with other deposit boxes, to which the guests have direct access to without having first to ask the hotelier, provided that they are situated in a proper place, and that they are not within easy reach of the public then it should not be deemed that the thing within the safety deposit box has been deposited with the hotelier.

It is however the hotelier's responsibility to see that such boxes are placed in a safe place in the hotel. In other words the hotelier must make sure that the safety deposit boxes, must not be seen from places frequented by the general public, and therefore the management must make it a point to allocate such safety deposit boxes away from places like the lobby, dining room, restaurant, ballrooms and other reception rooms.

(b) if he has refused to receive the depost of property which he is bound under the provision of the next following subsection to receive for safe custody.

It must be said at this point that a secondary aim of the International convention, re hoteliers was to encourage hotels to contain within them strong rooms or large safes in order that guests may deposit their valuables there. The creation of strong rooms in hotels is a benefit both for the guest and at

the same time for the hotelier; it is obviously beneficial as far as the guest is concerned because he is afforded a safer place than his room for the safe keeping of his valuables, and it is also beneficial for the hotelier because the more things are put in the hotel safes the less can the guest claim that the object has been found missing from his room. Also it is much easier for the hotelier to keep an eye on the hotel safe than it is for him to keep an eye on all the other rooms, regarding which he is also responsible under Sec. 1082 (1) up to the sum of seventy five pounds, irrespective of fault. Thus in view of the above, it pays the hotelier as much as it pays the guest to have these strong rooms as part of the hotel.

Therefore in order to encourage the hoteliers, or rather to force the hoteliers to install these strong rooms on their premises, the legislator created this punitive provision as a result of which a hotelier is unlimitedly liable for the safety of a thing if he refuses to receive the property which we are told he is bound to keep.

The section which states this obligation on the part of the hotelier is Section 1082, subsection 3, which together with Section 1082, subsection 4, I shall deal with here for reasons of clarity before attempting to deal with Section 1082 subsection 2 paragraph (c).

Thus, a hotel-keeper is bound to receive articles for safe keeping. Section 1082 ss. 3 states:-

> "A hotel-keeper shall be bound to receive for safe custody securities, money and valuable articles except dangerous articles and such articles as having regard to the size or standard of the hotel are cumbersome or have an excessive value."

This subsection is considered as a very good, practical, and fair subsection.

Good, because as stated it encourages or makes hoteliers provide the necessary safes or strong rooms which in the long run as above explained are beneficial to both guest and hotelier alike. It is a good section because it prohibits the hotelier from receiving articles which are dangerous.

Pratical, because it permits the hotelier from accepting articles which are excessively cumbersome when taking into consideration the size of the hotel.

Fair, because the hotelier may refuse to accept something beyond the standard of the hotel. Thus whilst it is only right that the keeper of a small pension should provide a safe for keeping safe certain articles, it is only fair that he should be given the right to refuse the responsibility of keeping an object which he would be unable to compensate in case of loss, due to its excessive value.

Section 1082 ss (4) affords the hotelier protection. It affords the hotelier protection because since a hotelier is unlimitedly liable for property which has been deposited with him, and since he is **OBLIGED** by law to provide for its safe keeping, when requested by a guest, any odd guest may on withdrawing his property claim untruthfully that the withdrawn amount is less than the deposited amount.

Section 1082 subsection (4) states:-

"A hotel-keeper shall have the right to require that any articles delivered to him for safe custody shall be in a fastened or sealed container."

Thus the hotelier is by this section given the opportunity to eliminate any untruthful claims made by the guests.

(c) In any case in which the damage to, or destruction, or loss of property has been caused voluntarily, or through negligence or lack of skill even in a slight degree by him or by a person in his employment or by any person for whose actions he is responsible.

This section apart from making the hotelier unlimitedly responsible for damage or loss that takes place due to his fault, makes him also responsible in an unlimited manner for damage or loss that takes place due to his fault, makes him also responsible in an unlimited manner for damage done by staff or persons for whom he is responsible. This kind of liability is reminiscent of the more modern trend on the continent as far as liability in general for damage done by employees is concerned. This we saw when discussing the responsibility of employers for acts done by employees. In Malta we do not have this kind of general liability as evident in Section 1080. In that section one sees that an employer in Malta is only held liable for damage done by employees if he employed an incompetent person or a person whom he had not reasonable grounds to consider competent.

Thus we see how this subsection, is not in line with Section 1080 since it establishes an unlimited liability as far as the hotelier is concerned, if damage is done by persons in his employment, or by any person for whose actions he is responsible.

Another important element in this subsection, which brings to light another aspect which is not often found in our Law is that the hotelier is responsible for damage to, or destruction, or loss of property which has been caused voluntarily, or through negligence, or lack of skill even in **a slight degree.**

The standard of negligence or lack of skill necessary for liability, is of a slight degree. This is unusual because normally the standard necessary for liability is that of the ordinary man in the street, a normal and ordinary standard and not Culpa laevissima.

Section 1082 subsection (5) and subsection (6)

Through Sections 1082, one sees that the hotelier may be either limitedly or unlimitedly responsible for damage, destruction or loss of property in the hotel.

However, although this liability may appear absolute, one must look at Section 1082 subsections (5) and (6), which are indeed very important sections

especially as far as the hotelier is concerned, for we see in these sections certain saving provisions which may exempt the hotelier from even what may appear to be the strict liability of Section 1082 subsection 1 and 2.

Section 1082 subsection (5) says:-

> "The provisions of subsections (1), and (2) of this section shall not apply if the guest, after discovering the damage, destruction or loss, does not inform the hotel-keeper without undue delay or if the damage to, destruction or loss of property is due:-
>
> (a) To a fortuitous event or to irresitable force; *or*
>
> (b) To a reason inherent in the nature of the property damaged, destroyed or lost; *or*
>
> (c) To an act or omission of the guest by whom it was brought into the hotel, or of any person, other than the hotel-keeper, to whom such guest may have entrusted the said property or of any person in the employment of such guest or accompanying him or visiting him."

The above section is relatively straight forward, and much elaboration would be superfluous.

It would be most unfair and most inhuman to make a hotelier liable for the destruction of a priceless painting if it is destroyed during an earthquake, whilst it would be most idiotic to make a hotelier liable for the loss of a piece of jewellery if the guest gave it to the cook for safe keeping.

This subsection establishes certain obvious criteria which if found to be in existence, quite rightly, exonerate the hotelier from any liabiliaty.

Another most interesting subsection is 1082 (6) which runs as follows:-

> "Any tacit or express agreement between a hotel-keeper and a guest entered into before any damage to destruction or loss of property has occured and purporting to exclude reduce or make less onerous the hotel-keeper's liability as established in this section shall be null and void."

As far as this part of the subsection is concerned therefore an agreement entered between the hotelier and the guest exempting him from liability is void, however, this part of the section is followed by a very weighty proviso, which seems to run counter to a large extent, the whole purpose of the concept of unlimited liability of the hotelier. The proviso says:-

> "Provided that in cases referred to in paragraphs (a), and (c) of subsection 2 of this section, where the damage to or destruction or loss of property has not been caused by a person mentioned in the said paragraph (c), vountarily or through gross negligence any agreement signed at any time by the guest whereby the hotel keeper's liability is reduced to an amount not less than £75, shall be valid."

This proviso makes very serious inroads, into the purpose and the aim behind the creation of unlimited liability of the hotelier when the thing is destroyed, damaged or lost while in his possession or when the thing has been destroyed, damaged or lost, not voluntarily or negligently by one of the persons mentioned in Section 1082 subsection 2 paragragh (c).

As suggested whilst discussing the said paragraphs, the purpose behind Section 1082 s.s. 2 paragraph (a) and (c) was:-

Re (a), to make sure that the hotelier takes proper care of things in his possession and Re (c), to make a hotelier responsible for persons in his employment and therefore to encourage him to find the right sort of people for the jobs.

Through Section 1082, subsection 6, the importance of Section 1082 as a whole,drops to a very low level indeed because, of the fact that from a position where the hotelier is responsible completely and it is up to him to prove his innocence by invoking one of the conditions stipulated in Section 1082 s.s. 5, one has the position that it is up to the guest to prove that the loss, destruction or damage was committed by the staff, or the hotelier, or persons for whom he is responsible, either intentionally or through gross negligence.

Apart from the above consideration, whilst in Sec. 1082 s.s. 2 paragraph (c) it is enough if one of the staff or the hotelier himself acted with *slight* negligence, in the proviso of the sub section we are discussing,the hotelier will not be responsible unlimitedly unless the person in his employment or himself acted either voluntarily or with **GROSS** negligence.

It is true as some critics have put it, that all this provided for in the proviso to section (6), need not take place at all because such a proviso may be made use of only if both guest and hotelier are in agreement. However, one may very well ask:-

Is the guest always aware of the fact that he has consented to such an agreement? Such a question is not as absurd as it may sound. The most common occurrance as a perfect example of the above is the case of **small print clauses.**

These are those clauses which would contain such an exemption from liability located in a checking-in sheet, at the bottom of the page in minute writing. It is known that all guests sign some kind of papers when checking into hotels, therefore would such clauses purporting to implement that contained in the proviso in question, be held as valid if the guest signs the form as part of the routine of checking into a hotel without actually realizing or even noticing the small print clause?

The only way the problem could be solved, if it ever arose, is by dealing with one of the basic essential elements of contract: that is, consent. If consent is vitiated by fraud, violence or error, such consent is rendered invalid, thus the agreement would fall through. If error is proved or even fraud, such "an agreement" should likewise fall through.

By way of conclusion on the Liability of Hoteliers, the following is a resume of the whole position:

A hotelier is liable limitedly or unlimitedly, unlimitedly in the cases stipulated in Section 1082 ss (2); however if there is an agreement as mentioned in the proviso to Section 1082 ss(6), the hotelier would in effect be liable (depending of course on the existence or otherwise of the conditions stipulated in Section 1082 ss (5), in which case he is not at all liable):-

1. Up to Lm75, for destruction, damage or loss of property brought into the hotel.
2. Up to Lm75, for destruction, damage or loss of property, if the thing is in the possession of the hotelier.
3. Up to Lm75, when the destruction, loss, damage is created by the staff, hotelier, or persons for whom he is responsible when the tort is not commited with intention or through gross negligence.
4. UNLIMITEDLY if prior to the destruction, damage or loss, the hotelier refused to accept by deposit the thing destroyed, lost or damaged.
5. UNLIMITEDLY if the damage, destruction, or loss is caused by the hotelier, staff, or by persons for whom he is responsible either voluntarily or through gross negligence.

5. Section 1083:- **LIABILITY OF THE OWNER OF AN ANIMAL.**

This section runs as follows:-

> "The owner of an animal, or any person using an animal during such time as such person is using it, shall be liable for any damage caused by it, whether the animal was under his charge or had strayed or escaped."

At first sight this seems to be quite a straightforward section, however there are a few points to which one must give particular attention.

Primarily should one consider this section as one purporting to establish an absolute liability in the sense that the owner of an animal is also responsible for damage arising out of force majeure etc.? The Law does not explicitly exclude the owner's liability in such a case, as it does in the section dealing with hoteliers. However such an interpretation would really go against all dictates of fairness and common sense; it is only fair not to hold a farmer responsible for damage done by pigs on the loose if these suddenly found themselves outside their sty after an earthquake. In fact, it has traditionally been accepted that if the person in control of the animal proves that the damage was caused through circumstances which can be considered as excluding fault, then there should not be any liability.

Other than a *cas fortuit* or *force majeure* a person is liable for the animals he owns irrespective of the normal daily nature of the animal. Thus, if an individual owns a dog who is normally tame, and this dog one fine day, decides to bite someone, even if that dog was provoked into doing so by teasing children, he would still be responsible. This is the position in Malta; In England on the other hand, there exists the idea of giving such a dog which is normally tame and which suddenly bites an individual, what is referred to as a *second chance*. The disadvantage with this British second chance is obviously that it is up to the plaintiff to prove that the owner knew of such vicious tendencies in the dog. Since it is a very subjective sort of proof it may sometimes, or most times, be impossible for the plaintiff to come forward with such proof and therefore

the owner would get away scot free in cases when he should not.

Carbonnier says that it is not enough for the individual to prove that he was not at fault but the modern doctrine incorporated in Article 1385, of the French Civil Code has an Idea of Risk - that is - he who profits in one way or another by keeping the animal must support all the risks it carries along with it.

According to Carbonnier, the best defence to such a claim by a victim are the following:-

1. Force Majeure.
2. Fait d'un tiers - This would mean if a dog bites 'A' after he was teased by 'B' walking along side 'A'. (As far as this defence is concerned, Carbonnier says that this is not a fool proof defence).
3. Fait de la victim:- When a thief gets bitten by a guard dog.

6. Section 1084:- **LIABILITY OF THE OWNER OF A BUILDING.**

This form of indirect responsibility is found in Section 1084 which states:-

> ''The owner of a building shall be liable for any damage which may be caused by its fall, if such fall is due to want of repairs or a defect in its consturction, provided the owner was aware of such defect or had reasonable grounds to believe that it existed.''

This is a section which to my mind needs a great deal of amendment because if it is made full use of, by certain parties in certain cirumstances, this may defeat the object of it being included as a form of tortous liability, the social aim of which after all is to make good the damage negligently or voluntarily caused to an individual.

This Section may be viewed cirtically from two points of view:-

A. Looking at the section bearing in mind that the owner is also the occupant of the tenement.
B. Looking at the section bearing in mind that the owner is **NOT** the occupant of the tenement.

A. Looking at the Section bearing in mind that the owner is also the occupant of the tenement.

The first thing that comes to mind on reading this section is that as is the case with Section 1077, the burden of proving the lack of care or negligence required is on the plaintiff. In Section 1084, although like section 1077, it is the plaintiff who must prove the individual's negligence, the proof required here is almost impossible to obtain because of the very subjective nature of the evidence required. The Law says''...Provided the owner was aware of it...''

The normal course of events if damage was done by the fall of a building is that if the defendant denies that he was aware of the defect even if in truth he was aware of it, it is up to the plaintiff to prove such *awareness,* and how is a plaintiff going to prove such a subjective state of mind as *awarness.*

The law goes on to say ''or has reasonable grounds to believe that it existed..'' Unless the *grounds* arise from facts that can be proved, such as the

plan of the house, how is a plaintiff, an outsider to the defendant's household, going to prove that the defendant had reasonable grounds to believe that it existed.

The first part of the Section "The owner of the building shall be liable for any damage which may be caused by its fall, if such fall is due to want of repairs or to a defect in its construction..." is perfectly reasonable. When a plaintiff alleges that he has been injured by the fall of a building it is up to the defendant to prove that repairs have been carried out and that there is no defect in construction.

This is the position both in France and in Italy. The French Civil Code-Section 1386 says:-

> "Le proprietaire d'un batiment est responsable du domage causé par sa ruine lorsqu'elle est arrivé par suit du defaut d'entretien ou par vice de sa construction."

The Italian Civil Code section 2053 says:-

> "Il proprietario di un edificio o di altra costruzione è responsabile dei danni cagonati dalla loro rovina salvo che provi che questa non è dovuta di manutenzione o a vizio di costruzione."

However an argument brought forward against the removal of the second part of Section 1084 - i.e. the removal of the words "Provide ... existed." is that why should the owner be held responsible for the mistakes of the architect?

There is obviously some sense in this argument. However there seems to be an even stronger counter argument which holds that a plaintiff who has already been through enough should not go through the added trouble of suing the owner, who would in turn refer him to the architect who, for all intents and purposes, might very well refer him to the building contractor.

Thus it is only practical that the plaintiff in such cases should sue the owner directly and then it is up to the owner to sue other persons if he deems it appropriate.

On the other hand however, the honest owner who truthfully did not know of the defect in construction must be protected against the laws of prescription. Because if such a fall occurs after fifteen years as far as the defect in construction is concerned, the owner could possibly not have recourse against the architect after the plaintiff has sued the owner for damages.

Therefore in order to avoid the possibility of the owner who is aware of the defect and yet whose awareness cannot be proved, getting out of the whole situation scot free, and on the other hand in order to protect the honest owner who was unaware of such defect, the Law should perhaps be amended in the following manner:

1. The owner of a building is liable for any damage caused by its fall if such fall is due to want of repairs or a defect in construction.
2. Provided that the owner shall have a right of action against the architect with respect to the defect in construction unknown to the owner irrespective of when such contingency occurs but within the period of six months

from the filing of the action by the plaintiff against the owner.

B. Looking at the section and bearing in mind that the owner is **not** the occupant of the tenement.

Another odd thing about this section is that it only seems to make the owner of the tenement responsible. Whilst at first glance this seems rather normal, if one thinks of the number of tenements subject to perpetual emphyteusis in Malta, or sub-emphyteuta's protected by the Act of 1979, it is very unfair to make the OWNER responsible for damage caused by the fall of a building due to lack of repairs when he is not in actual fact bound to carry out any repairs at all on the tenement.

Thus it is only fair to say that, if damage ensues by the fall of a building due to lack of repairs, then it is the occupant (if he is an occupant who is legally bound to keep the tenement in good repair) that should be made to answer for the damage.

Whilst it is appropriate to adopt this argument in case of a fall of a building due to lack of repairs,it may not be applicable in cases of defects of construction where it is wiser to keep the owner responsible.

Therefore it may not be a bad idea to add on another subsection to the two that could ideally replace the present section 1084 and which could run as follows:-

3. If the damage is caused by the fall of a building, which fall is due to lack of repairs, it is the person bound to carry out such repairs who shall be made liable.

The idea of making the "Occupier" responsible rather than the owner is found in Section 1085. However for the purposes of Section 1084, it would be unfair to make *any* occupier such as a lessee liable for damage due to lack of repairs or defect in consturction. The kind of occupier who is to be held liable for the purposes of an amended version of Section 1084, would be an emphyteuta, a usufructuary obliged to carry out any kind of repairs or, generally speaking, any occupier who is obliged to keep the tenement in good repair.

7. Section 1085:- RULE AS TO LIABILITY OF THE OCCUPIER OF BUILDINGS IN CASE OF DAMAGE CAUSED BY THE FALL OF A THING

This section states:-

> "Where any damage is caused to any person by the fall of a thing suspended or placed in a dangerous position, or by a thing or matter thrown or poured from any building, the occuppier of such building, provided he himself has not committed the act, and has not in any way contributed thereto, shall not be liable except in so far as the provisions contained in this Title relating to the liability of a person for damage caused by another, are applicable to him."

This section has been referred to, by some critics, as a most lenient section, and I am inclined to agree with this view.

A good thing about this section is that it excludes the possibility of claiming damages off the occupier of a building when such damages are not really due.

On the other hand however, there are quite a few loopholes and oddities in this section.

The first oddity is in the entire approach of the section in that it presents the reader with a case of exclusion from liability rather than with a case of Indirect Liability.

Secondly, whilst burdening the occupier with liability indirectly as in Section 1077 and directly as in Section 1074 the Section overloads the plaintiff with the burden of bringing forth proof that it was the occupier himself who committed the act.

Thirdly, when one analyses the section, one realizes that the occupier will not be held liable unless he committed the act or contributed thereto or unless he is responsible for the actions of those who made the damage.

Thus one asks, why did the legislator bother to create section 1085 at all, because after going through the section one sees, that what has been said in Point three above is no more and no less that what is provided by:-

1. S. 1074 - Every person, however, shall be liable for the damage which occurs through his fault.
2. S. 1075 (1) - A person is deemed to be in fault if in his own acts he does not use the prudence, diligence and attention of a bonus paterfamilias.
3. S. 1077 Any person having the charge of a minor or of a person of unsound mind shall be liable for any damage caused by such minor or person of unsound mind if he fails to exercise the care of a bonus paterfamilias, in order to prevent the act.
4. S. 1080 - Where a person for any work or service whatsoever employs another person who is incompetent, he shall be liable for any damage, which such other person may through incompetence in the performance of such work or service cause to others.

Notwithstanding the above however, the advantage one may find in having and keeping such a Section is that it establishes criteria in what might be a case where the individual concerned may be unsure as to what the exact position is notwithstanding the other provisions of the law referred to above.

8. Section 1087:- **AIDERS OR ABETTORS.**

Whilst section 1087, dealing with Aiders or Abettors, does not traditionally form part of the notion of Indirect responsibility due to the fact that Aiders and abettors are really 'accomplices' to use Criminal Terminology, one might as well deal with section 1087 here, because, although Aiders and Abettors are co-partners in the Tort they themselves do not actually commit the tort, hence the *indirect* responsibility.

Section 1087 runs as follows:-

> "Where damage has been unjustly caused, any person who has wilfully contributed thereto with advice, threats, or commands, shall also be liable."

This section is quite straightforward except for the word "Unjustly".

This word can cause a lot of problems because all that is unjust in not necessarily illegal, as much as that which is illegal is not necessarily unjust.

The point that I am trying to make here is that, not *any* unjust damage will render a person liable because sometimes, a person is fully within the law to do a particular thing, and yet this may not be very just and fair thing to do.

Therefore it appears that the word *Unjust* in Section 1087, must be interpreted in the sense of Unlawful.

Before concluding, one must point out that Section 1087, is not referring to **Negligent** Unlawful Acts, but **Voluntary** Unlawful Acts, because if one is advised, threatened, or commanded it cannot be said that one did the thing through Negligence. Whether one is coerced is another matter, but for our purposes, it may be considered to be a damage caused voluntarily as against negligently.

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